

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GENE T. FAVORS,

Plaintiff,

CASE NO. 06-CV-13487

v.

DISTRICT JUDGE DAVID M. LAWSON
MAGISTRATE JUDGE CHARLES BINDER

CATHY GARRETT,
JANE DOE,
JANE DOE,

Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
PURSUANT TO THE PRISON LITIGATION REFORM ACT

I. RECOMMENDATION

IT IS RECOMMENDED that Plaintiff's Application to Proceed Without Prepayment of Fees and Costs be **DENIED** pursuant to the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. § 1915(g).

II. REPORT

Plaintiff is a *pro se* prisoner who is currently incarcerated at the Saginaw Correctional Facility in Freeland, Michigan. Pending, pursuant to an Order of Reference from United States District Judge David Lawson, is Plaintiff's Application to Proceed without Prepayment of Fees and Costs. (Dkt. 2.) Upon consideration of the application, I conclude that the case is ready for Report and Recommendation.

The Prison Litigation Reform Act (“PLRA”), which was enacted on April 26, 1996, contains a provision, codified at 28 U.S.C. § 1915(g), which is commonly known as the “three strikes” provision. It states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). If a prisoner has attained “three strikes,” he is thereafter precluded from proceeding *in forma pauperis* in civil actions unless under threat of immediate harm. *Wilson v. Yaklich*, 148 F.3d 596, 602-04 (6th Cir. 1998). The Sixth Circuit has held that dismissals of actions prior to the effective date of the PLRA may be counted as “strikes” for the purposes of applying § 1915(g). *Id.* Moreover, the *Wilson* court held that the “three strikes” provision does not violate the Equal Protection Clause, the Due Process Clause, or the Ex Post Facto Clause; it is likewise not an unconstitutional bill of attainder. *Id.* at 604-06.

A search of the docketing records of the United States District Court for both the Eastern and Western Districts of Michigan indicates that Plaintiff has filed at least 12 prisoner civil rights cases in the Eastern District of Michigan and at least 11 cases in the Western District of Michigan. (See attached table.) Plaintiff has had at least five prisoner civil rights actions or appeals dismissed by federal courts on the grounds that they were frivolous or failed to state a claim. *See* 88-CV-00417 (dismissed as frivolous), and 88-1735 (affirmed on appeal); 91-CV-74647 (dismissed as frivolous); 92-CV-00446 (dismissed for failure to state a claim); and 95-CV-73874 (dismissed as frivolous). Additionally, he had one case where summary judgment was granted for defendants on the grounds that his claims were without merit, *see Favors v. Koehler*, 1986 WL 16559 (6th Cir.

1986) (unpublished order), and another case where summary judgment for defendants was granted because the complaint was without merit. *See Favors v. Barnett*, 1991 WL 15150 (6th Cir. 1991) (unpublished order). Although the available records of these two cases do not use the words “frivolous” or “failure to state a claim,” these judgments arguably also constitute “strikes,” as may one or more of the six cases listed in the table where the docket merely reflects that summary judgment was granted for defendants.¹

In his Complaint, Plaintiff makes no allegation that he is “under imminent danger of serious physical injury.” Instead, he alleges that several clerks at the Wayne County (Michigan) Circuit Court have failed to file or return his *pro se* motions submitted in a civil case proceeding in that court. I suggest that no “imminent danger” can be inferred from this claim.

Accordingly, because Plaintiff has had at least three dismissals that count as “strikes” and has not alleged that he is in danger, I suggest that Plaintiff’s application to proceed without prepayment of fees and costs be denied pursuant to 28 U.S.C. § 1915(g) and that Plaintiff be instructed that he must pay the \$350 civil case filing fee or the case will be dismissed.

III. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed.2d 435 (1985); *Howard v. Sec’y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are

¹ The docket entries in these cases do not reveal why Plaintiff was unsuccessful, and not all unsuccessful claims are frivolous, only those which have no “rational or arguable basis in law or in fact.” *Wilson*, 148 F.3d at 600.

advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

s/ *Charles E. Binder*

CHARLES E. BINDER
United States Magistrate Judge

Dated: August 31, 2006

Prisoner Civil Rights Cases filed by Gene T. Favors

	Case Name	District	D Ct #	Ap Ct #	Disposition
1	Favors v Koehler	WD Mich	unknown	85-1114	SJ for Defs - claims "without merit"
2	Favors v Foltz	ED Mich	unknown	85-1239	Appeal dismissed for lack of jurisdiction
3	Favors v Barnett	WD Mich	88-00627	90-1690	SJ for Defs - complaint "without merit"
4	Favors v Brown	WD Mich	88-00765	89-2287	SJ for Defs
5	Favors v Dawson	ED Mich	88-60643	89-2330	SJ for Defs
6	Favors v Hicks	ED Mich	88-71376	89-1690	SJ for Defs
7	Favors v Bos	WD Mich	88-00417	88-1735	Dismissed as frivolous; Aff'd on Appeal
8	Favors v Koehler	WD Mich	unknown	88-1216	Appeal dismissed for lack of jurisdiction
9	Favors v Johnson	WD Mich	unknown	88-1215	Appeal dismissed for lack of jurisdiction
10	Favors v Taylor	ED Mich	89-71105	92-1395	2 Defs dismissed for frivolousness, remaining damages claims dropped, injunction claim dismissed as moot
11	Favors v Langley	ED Mich	90-70979	91-1077	SJ for Defs
12	Favors v Toombs	ED Mich	91-74647	92-2218	Dismissed as frivolous
13	Favors v Strassburg	WD Mich	92-00346		Dismissed / failure to pay reduced filing fee
14	Favors v Bell	WD Mich	92-00446	94-2359	Dismissed for failure to state a claim
15	Favors v Strassburg	WD Mich	92-00553		SJ for Defs
16	Favors v Withrow	WD Mich	93-00351		Dismissed / failure to pay partial filing fee
17	Favors v Withrow	WD Mich	93-00089		Dismissed / failure to pay partial filing fee
18	Favors v Palmer	ED Mich	95-73874	96-1028	Dismissed as frivolous
19	Favors v Horning	ED Mich	96-71883	98-1389	Dismissed with prejudice
20	Favors v Horning	ED Mich	96-72485	96-2244	Dismissed / failure to pay partial filing fee
21	Favors v Burke	ED Mich	99-60157	99-2428	SJ for Defs
22	Favors v Thompson	ED Mich	99-10015	99-2315	IFP denied / 3 strikes / case dismissed
23	Favors v Garrett	ED Mich	06-13487		Instant case

CERTIFICATION

I hereby certify that this Report and Recommendation was electronically filed this date and served in the traditional manner on Gene Favors and Honorable David M. Lawson.

Dated: August 31, 2006

By _____ s/Mary E. Dobbick
Secretary to Magistrate Judge Binder